FILE COPY

IN THE

Supreme Court of the United States

October Term, 1943

No. 1065

MARY V. DALTON, Petitioner,

v.

HOLLY SUGAR, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH I. NACHMAN,
Counsel for petitioner.

Printed by Byron S. Adams, Washington, D. C.

INDEX

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

MARY V. CHANEY, *Petitioner*,

v.

HOLLY STOVER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Fourth Circuit.

OPINIONS BELOW.

Neither the opinion of the District Court (R. 19-28), or that of the Circuit Court of Appeals (R. 32-37) is yet officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 28, 1946 (R. 37). The jurisdiction of this

Court is invoked under Section 24 of the Bankruptcy Act (11 U. S. C. 47), and Section 240(a) of the Judicial Code (28 U. S. C. 347), as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

This is a proceeding under Section 75(s) of the Bankruptcy Act (11 U. S. C. 203(s)). The Conciliation Commissioner, after an appraisal of the property, ordered that all proceedings against petitioner be stayed for three years, and permitted her to retain possession of her property provided she pay a fixed rental plus certain payments on account of her indebtedness (R. 2-5). Subsequently, petitioner requested a reappraisal of the property, or that its value be fixed at a hearing, that a reasonable time be fixed within which she might redeem by paying that amount into court, that upon such payment the property be turned over to her free of liens, and her discharge granted (R. 5). After a hearing, the Conciliation Commissioner fixed the value of the property at $10,720, but refrained from making any order relative to redemption for approximately twenty-one months, and then denied the right to redeem (R. 8, 13). On review, the District Court held that petitioner was entitled to redeem at the reappraised value of $10,720, but also required the payment of certain unpaid installments of rental, and reserved for future decision the question whether petitioner's right to redeem might be defeated by respondent's request that the property be sold publicly (R. 25, 26-27). In the Circuit Court of Appeals, petitioner assigned as error the rulings of the District Court regarding the unpaid installments of rental and the reservation of decision on respondent's asserted right to a sale.[1] Respondent did not cross-appeal. The question presented is whether that portion of the District Court's order which adjudged that petitioner might redeem the property at the reappraised

[1] The Statement of Points filed by petitioner is printed as Appendix A to this petition. It appears at pages 173-174 of the original record filed with the Clerk of this Court.

value of $10,720, was before the Circuit Court of Appeals for review. If that question is answered in the affirmative, then a second question is presented, namely, whether under the facts of this case, the Circuit Court properly directed that the property be reappraised, or its value determined at a hearing.

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals was without jurisdiction to reverse or modify that portion of the District Court's judgment which provided that petitioner might redeem at the reappraised value of $10,720, since respondent did not appeal from the portions of that order which were adverse to him.

2. The Circuit Court of Appeals erred in ruling that there should be a further appraisal of the property before petitioner would be permitted to redeem it.

STATUTE INVOLVED.

The statute involved is Section 75(s)(3) of the Bankruptcy Act (11 U. S. C. 203(s)(3)), the pertinent portions of which are as follows:

> At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, * * *: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on principal, for distribution to all secured and unsecured creditors, as their interest may appear, and thereupon the court shall, by order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: * * *.

STATEMENT.

Petitioner began this proceeding by a petition under Section 75 of the Bankruptcy Act (11 U. S. C. 203). Failing to effect a composition with her creditors under sub. sec. (a)-(r), she was adjudged a bankrupt, and the matter was referred to a conciliation commissioner for administration (R. 1).[2] In July 1942, the Commissioner approved an appraisement of the property at $5,500, stayed all proceedings against petitioner, and permitted her to remain in possession of her property for three years, provided she pay an annual rental of $500, and an additional $330 a year to be credited on the mortgage indebtedness (R. 2-5). In December 1942, petitioner asked that the property be reappraised, or its value determined on a hearing, that a reasonable time be fixed within which she might pay the sum so ascertained into court, and that the property be then turned over to her free of liens, and her discharge granted (R. 5). An order denying a reappraisal was reversed by the District Court on February 11, 1943 (R. 6-8).

The Conciliation Commissioner took no action toward a reappraisment until January 7, 1944, when a hearing was held to determine the value of the property, but not until August 21, 1944 did he enter his order fixing the value at $10,720 (R. 8). That order, however, did not provide, as petitioner had requested, for carrying out the redemption provisions of the Act. No action having been taken in that respect, petitioner, on March 8, 1945, filed an amended petition reciting that the order of August 21, 1944, made no provision with respect to redemption, and prayed for an order (1) fixing a reasonable time within which she might pay the $10,720 into court, (2) that upon such payment the property would be released to her free of liens, and (3) that

---

[2] On respondent's motion the proceeding was dismissed on the ground that petitioner was not a farmer. The Circuit Court of Appeals reversed that order and remanded the cause with direction to proceed in accordance with the statute. *Chaney* v. *Stover*, 123 F. (2d) 945.

her discharge be granted (R. 9). Thereafter, petitioner's counsel asked the Commissioner, on several occasions, to take some action on her petitions (Appendix to this petition pp. B3, 4, 5, 7 and 8).[3] However, the Commissioner took no action until after respondent, in April 1946, filed a petition alleging that petitioner was in default in the payment of rentals, and asking that a trustee be appointed to sell the property (R. 10, 13).[4] Petitioner moved for a dismissal of respondent's petition (R. 12).

By order of May 20, 1946, the Commissioner denied the petitions for redemption and appointed a trustee with direction to ask for the sale or other disposition of the property (R. 13). On review, the District Court reversed that order (R. 19, 25). That Court directed that petitioner have 20 days to redeem by paying into court $10,720, fixed as the value of the property by the order of August 21, 1944, together with all unpaid installments of rental, and that after such payment the court would decide whether petitioner's right of redemption could be defeated by the respondent's request for a public sale.[5] On appeal to the Circuit Court petitioner assigned as error the rulings of the court relating to the unpaid installments of rental, and the reservation of decision on respondent's asserted right to a public sale.[6] Respondent did not cross-appeal.

On the authority of *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, the Circuit Court of Appeals reversed (R. 32). That Court held that the District Court had

---

[3] The material printed as Appendix B to this petition consists of letters passing between the Commissioner and counsel. The originals of letters to counsel, and copies of those to the Commissioner, have been filed with the Clerk of this Court.

[4] An amended petition asked that the land "be discharged from these proceedings" (R. 12).

[5] This holding was based on the District Court's prior holding in *In Re Carter*, 56 F. Supp. 385, which the Circuit held to be inconsistent with this Court's ruling in *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273.

[6] See note 1, infra, p. 2.

erred in requiring the payment of the redemption fund into court before deciding whether respondent was entitled to a public sale, and in requiring payment of the unpaid rentals. It also held, however, that it could judicially notice that there had been an enhancement in property values since the reappraisal figure was fixed in August 1944, and remanded the cause with direction that the property be again appraised, or its value fixed at a hearing, and directed that petitioner be permitted to redeem at that value (R. 36-37).

REASONS FOR GRANTING THE WRIT.

1. The District Court specifically held that petitioner was entitled to redeem the property "by paying into court the amount at which the property has been reappraised"—$10,720, less payments made on account (R. 25). While petitioner appealed from the order, no error was assigned to that holding, and respondent did not cross-appeal. Accordingly the Circuit Court was without jurisdiction to reverse or modify the portions of the order favorable to petitioner. The decisions of this Court are uniform that when only one party has appealed "the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard * * * except in support of the decree from which the appeal of the other party is taken" (*Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191-192). Under such circumstances respondent could not "attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not deal with below" (id. at 191). To the same effect see *Ryerson* v. *United States*, 312 U. S. 405; *LeTulle* v. *Scofield, Collector*, 308 U. S. 415; *Helvering* v. *Pfiffer*, 302 U. S. 247; *Alexander* v. *Cosden Co.*, 290 U. S. 484; *United States* v. *American Railway Express Co.*, 265 U. S. 425; *Peoria etc. Ry. Co.* v. *United States*, 263 U. S. 528; *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Bothwell* v. *United States*, 254 U. S. 231; *United States* v. *Black Feather*, 155 U. S. 180; *The Maria Martin*,

12 Wall. 31. Nor was the Circuit Court empowered to modify the decree on its own motion, for except to the extent that error is assigned by a party appealing, the appellate court is required to take the order of the District Court as "unimpeachable and right" (*Landram* v. *Jordan*, 203 U. S. 56, 62). In modifying the District Court's order upon a ground which was not raised by an appeal, the Circuit Court granted respondent a judgment which was more favorable to him than the judgment entered by the District Court. It enhanced his rights and lessened those of petitioner, even though respondent had not appealed from the order. *Morley Const. Co.* v. *Maryland Casualty Co., supra.* The Circuit Court's ruling in that respect is not only in conflict with the decisions of this Court, but also conflicts with its own prior decisions, as well as with the decisions of other Circuit Courts of Appeals.[7] Its ruling was such a departure from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

2. The Circuit Court's ruling that the property be again appraised, is in conflict with the procedure established by the statute and deprived petitioner of a right expressly conferred thereby. Section 75 of the Bankruptcy Act was designed by Congress "to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sale and an oppressive burden of debt" (*Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 278). Its pro-

---

[7] *Swyer* v. *Smith*, 194 Fed. 762 (C. C. A. 4); *Rogers* v. *Marion County Lumber Corp.*, 251 Fed. 876 (C. C. A. 4); *G. L. Webster Co.* v. *Trinidad Bean & Elevator Co.*, 92 F. (2d) 177 (C. C. A. 4); *Swig* v. *Tremont Trust Co.*, 8 F. (2d) 943 (C. C. A. 1); *American Agriculture Chemical Co.* v. *Jankowski*, 105 F. (2d) 953 (C. C. A. 2); *Orient Petroleum Co.* v. *Wichita, etc. Trust Co.*, 17 F. (2d) 263 (C. C. A. 5); *Trinity Portland Cement Co.* v. *Bass Foundry & Machine Co.*, 26 F. (2d) 348 (C. C. A. 6); *United States Fidelity & Guarantee Co.* v. *Sweeney*, 80 F. (2d) 235 (C. C. A. 8); *Santa Marino Co.* v. *Canadian Bank of Commerce*, 254 Fed. 391 (C. C. A. 9). In the *Santa Marino* case, *supra*, the Court stated that "an appeal brings up for review only that which was decided adversely to the appellant" (p. 397), citing the Fourth Circuit's decision in *Swyer* v. *Smith, supra*, with approval.

visions "must be liberally construed to give the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregarded the spirit and the letter of the Act" (id. at 279). To carry out the congressional purpose, "the statute provide[s] an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor * * *" (*Borchard* v. *California Bank*, 310 U. S. 311, 316). The orderly procedure specified in the statute requires that when the bankrupt, preliminary to redemption, requests that the value of the property be redetermined, such determination should be made promptly, and when made, the bankrupt must be permitted to "pay the value so arrived at into court * * * and thereupon the court shall, by order, turn over full possession and title of said property free and clear of encumbrances to the debtor * * *" (Sec. 75(s)(3)). The statute provides for only one reappraisal (or the fixing of value at a hearing), and that was made. No additional appraisals are provided for. Accordingly, when the property was reappraised at the request of the bankrupt, her right to redeem at that value was fixed. This Court has held that the bankrupt's right to redeem at the reappraised value, or at the value fixed on a hearing, is an "express and fundamental statutory right" which could not be denied by the court on the basis of general equitable considerations. *Wright* v. *Union Central Life Ins. Co.*, *supra*.

This is not a case where a bankrupt requested a reappraisal and then failed to take the necessary steps to perfect the redemption. On the contrary, petitioner proceeded promptly and in strict compliance with the statute. She did everything possible to effect the redemption, but was prevented from doing so by the failure of the Conciliation Commissioner to perform the duty imposed upon him by the statute. After the District Court directed a reappraisal (R. 6), more than 18 months elapsed before the Commissioner held the hearing and entered the order fixing the value of the property (R. 8). Thereafter, petitioner's coun-

sel made at least six requests of the Commissioner that he take some action on her petitions for redemption,[8] but he failed to act until after respondent requested that the property be sold.[9] This is far from "compliance with the procedure required by the statute" which this Court held mandatory in *Borchard* v. *California Bank*, 310 U. S. 311, 318. In the *Borchard* case, *supra*, the bankrupt had requested an appraisal of his property, and that he be permitted to remain in possession thereof for the statutory period. Instead of proceeding in accordance with the statute, the bankrupt remained in possession under a stipulation with the bank. Some thirty-one months later, the bank requested leave to sell under its mortgage, which was granted by the District Court. This Court held that the bank could, at any time, have obtained action by the Conciliation Commissioner in accordance with the statute, and that it could not maintain "that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute" (310 U. S. at 318). The procedure followed by the Conciliation Commissioner in this case deviates from that prescribed by the statute to an equally substantial degree. It deprived petitioner of her "express and fundamental statutory right" (Wright case, *supra*), to redeem her property at its reappraised value.

---

[8] See letters dated March 28, 1945; April 24, 1945; August 17, 1945; September 5, 1945; September 24, 1945; and February 26, 1946, which appear as an appendix to this petition, pp. B2-10.

[9] The only reason ever assigned by the Commissioner for his failure to act was that "petitioner was delinquent in her payments and has never been willing to give me any reason for being delinquent" (R. 18). Both courts below, on authority of the *Wright* case, *supra*, held that the non-payment of rentals did not deprive petitioner of the right to redeem (R. 24; 34).

CONCLUSION.

For the reasons stated, petitioner respectfully submits that this petition for certiorari should be granted, that the judgment of the Circuit Court of Appeals be modified by deleting the provision for a further appraisal, and as so modified, that the same be affirmed.

Respectfully submitted,

JOSEPH I. NACHMAN,
Counsel for petitioner.

APPENDIX A.

Statement of Points

Original Record PP. 173-174

In the prosecution of her appeal the bankrupt will rely upon the following assignments of error:

1. The District Court erred in ruling that the question whether the bankrupt's right to redeem her property, by paying into court the value thereof as fixed in this proceeding, was superior to the request of the creditor for a public sale thereof, was prematurely raised in this proceeding.

2. The District Court erred in ruling that the bankrupt must pay into court the funds necessary to redeem her property, and only in the event the creditor thereafter requested a public sale, would the court be called upon to determine whether the bankrupt's right to redeem was superior to the creditor's request for a public sale.

3. The District Court erred in ruling that in order to redeem her property, the bankrupt must pay into court the unpaid installments of rental provided by the "stay order" of July 20, 1942, in addition to the value of the property as fixed in this proceeding.

4. That the twenty day period fixed by the District Court, within which the bankrupt might pay the redemption fund into court, was unreasonably short.

5. The District Court erred in failing to enter an order fixing a reasonable time (not less than 60 days), within which the bankrupt might pay into court the sum of $10,720.00 (the value of her property as fixed in

this proceeding), less payments heretofore made on principal, and further providing that upon such payment the property should be turned over to the bankrupt, free of all liens and encumbrances, and that she be granted her discharge, all as provided by Section 75(s)(3) of the Bankruptcy Act.

APPENDIX B.

September 28, 1944

Mr. Duncan Curry,
Cociliation Commissioner,
Staunton, Virginia

Mr. Joseph I. Nachman,
Attorney at Law,
Staunton, Virginia

Mr. L. W. H. Peyton,
Attorney at Law,
Staunton, Virginia

Mr. Charles A. Hammer,
Attorney at Law,
Harrisonburg, Virginia

Re: Mary V. Chaney, Bankrupt

Gentlemen:

A day or two ago I entered an order affirming an order of Mr. Curry, as Conciliation Commissioner, fixing a reappraisal value of the real estate of this bankrupt.

It appears that one of the matters of which the bankrupt complained is that after fixing the reappraisal value, the conciliation commissioner did not fix a time within which the bankrupt might redeem the property at that value. The Act provides that when the value of the property has been fixed, "the debtor shall then pay the value so arrived at into court". This would indicate that it was contemplated that the debtor would be prepared to pay the appraised value as soon as it was determined, and the statute makes no provision for any deferment in this payment. However, I have no doubt that the conciliation commissioner has authority to give the debtor a reasonable time

within which to make the payment and I am of the opinion that it is proper and desirable that a reasonable time should be granted. Whether that time should be thirty days or sixty days or a greater or a less time would be for the conciliation to determine upon his knowledge of the situation and I think the matter should be left to him.

I overlooked any discussion of this phase of the case in the memorandum which I wrote and of which you have received copies, but in any event my opinion would be the same as that expresses here, namely, that a time which appeared reasonable under all of the circumstances should be granted and that it would be for the conciliation commissioner to determine and not for the court, which would be lacking in that full knowledge of the case necessary to determine what would be a reasonable time. The purpose of this letter is to express my views on the subject and in order to indicate that it was not purposely ignored.

Very truly yours

/s/ JOHN PAUL
District Judge

March 21, 1945

Mr. Charles A. Hammer, Jr.,
Harrisonburg, Virginia

Dear Mr. Hammer:

Mrs. Ethel Irwin sent me a petition in re Mary V. Chaney, Bankrupt. On September 6, 1944, I wrote your associate, Mr. Joseph I. Nachman, asking him whether or not there was not a payment due from Mrs. Chaney on July 20, 1944. I cannot find that I ever received an answer from Mr. Nachman. My records indicate that the last payment made by Mrs. Chaney was $82.50 for the payment that was due on April 20, 1944. If this is correct, Mrs.

Chaney owes payments for July 20, 1944, October 20, 1944 and January 20, 1945. Please let me know if your records agree with this statement.

I am sending a copy of this letter to Mr. Joseph I. Nachman, 2906 Allison Street, Mt. Rainier, Maryland.

Very truly yours,

/s/ DUNCAN CURRY
Referee in Bankruptcy.

March 28, 1945

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Dear Mr. Curry:

I regret the delay in replying to your letter of March 21, to Mr. Hammer, a copy of which you sent to me. I was out of the city when it arrived and it has just reached me.

We are ready and anxious to redeem the property as soon as an order is entered fixing the amount and period of redemption, and we are, of course ready to pay all the sums that may be required of us to effect a complete redemption. So far as I can tell your records of the payments by Mrs. Caney is correct, and as I stated above we are ready to pay all sums properly payable by Mrs. Chaney as soon as an order permitting the redemption and fixing the time within which it is to be made. I understand from Judge Paul's letter to you and counsel after his order declining to modify the latest appraisal figure, that we were entitled to such an order, and I would appreciate it if you would give the requisite notice and enter the order at your earliest convenience, so that the matter may be closed with as little delay as possible.

I note your statement with reference to a letter of September 6, 1944, which you say you wrote me. I have never received such a letter. This may be due to the fact that I moved about that time and it was not forwarded to me or returned to you.

Very truly yours,

JOSEPH I. NACHMAN

April 24, 1945

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Dear Mr. Curry:

I have not heard from you as to what action you propose to take on the petition filed in the Chaney case, since I wrote you about a month ago. We are most anxious to bring this matter to a conclusion, as I assume you are.

Would you kindly set the matter for a hearing, or advise us of the order you propose to enter on the petition recently filed, as soon as you can conveniently do so.

Very truly yours,

JOSEPH I. NACHMAN

April 25, 1945

Mr. Joseph I. Nachman
2906 Allison Street
Mt. Rainier, Md.

Dear Mr. Nachman:

It seems to me that the first thing that is necessary in the Chaney case is for Mrs. Chaney to make the payments that are delinquent. If any other procedure at present is

proper except the payment of the delinquent payments, I would like to hear you and Mr. Hammer on the question.

Very truly yours,

/s/ DUNCAN CURRY
Referee in Bankruptcy

August 17, 1945

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Re: Mary V. Chaney

Dear Mr. Curry:

Now that the three year stay in this case has expired, I am wondering if we can now have a hearing on the debtor's petition to redeem which has been filed for some while, or have the prayer of the petition disposed of in some other way.

I trust some disposition of the matter can be made in the near future.

Very truly yours,

JOSEPH I. NACHMAN

August 23, 1945

Mr. Joseph I. Nachman
2906 Allison Street,
Mt. Rainier, Md.

Dear Mr. Nachman:

I received your letter, dated August 17, 1945, in re Mary V. Chaney, Bankrupt. Mr. J. M. Perry, attorney for Holly Stover, has been ill for several weeks. I doubt if any af-

firmative action can be taken in this case until his recovery. I, however, shall be very glad to hear from you about any suggestions of progress in the case.

Very truly yours,

/s/ DUNCAN CURRY
Referee in Bankruptcy

September 5, 1945

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Dear Mr. Curry:

Upon my return to Washington, I found your letter of August 23, 1945 with reference to the Chaney case. I regret to learn of Mr. Perry's illness; a fact of which I was not aware.

I, of course, do not wish to insist on any action while Mr. Perry is away from his office. Not knowing the nature of his illness, or whether he is able to discuss any business, I am wondering whether it would be possible to inquire of him, or his associate Mr. Peyton, if they have any objection to the entry of an order permitting the debtor to redeem the property at the appraised value and fixing the time within which it is to be done. In our view this is all that remains to be done. Of course, if there is any objection, I suppose the matter will have to wait until Mr. Perry is able to give it his attention, unless you or counsel have some other suggestion for bringing the matter to a conclusion.

If anything along this line can be accomplished, I will appreciate hearing from you.

Very truly yours,

JOSEPH I. NACHMAN

September 7, 1945

Mr. Joseph I. Nachman,
2906 Allison Street,
Mt. Rainier, Md.

Dear Mr. Nachman:

I received your letter, dated September 5, 1945. You will recall that Mrs. Chaney is delinquent in the payments in her case. I would like to hear from you whether or not she should pay the delinquent payments before any action of any kind is taken. My recollection is that the last payment she made was in the spring of 1944. I would like to hear from you about the delinquent payments. It seems to me that I wrote you several letters about them.

Very truly yours,

/s/ DUNCAN CURRY
Referee in Bankruptcy

September 24, 1945

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Dear Mr. Curry:

I regret the delay in replying to your letter of September 7.

In my view of the case Mrs. Chaney is not delinquent in the payment of rentals and curtails provided in the order of July 20, 1942. The statute requires that such payments be made until the debtor applies for redemption as outlined in sub-section (s). A petition to redeem at the appraised value has been on file since September 1942 and another petition asking for the same relief was filed last spring. Under these facts I feel that the debtor is entitled to an order providing for redemption at the appraised value

of $10,720.00. Within a reasonable time after the entry of such an order we shall be ready to pay that sum into court, and effect a redemption of the property. Needless to say, we are most anxious to have the requisite order entered at the earliest possible time. I trust this can be arranged with the least possible delay.

Awaiting your advise as to the disposition of the matter, I am

Very truly yours,

JOSEPH I. NACHMAN

Sept. 28, 1945

Mr. Joseph I. Nachman,
2906 Allison Street,
Mt. Rainier, Md.

Dear Mr. Nachman:

I received your letter, dated September 24, 1945, in re Mary V. Chaney, Bankrupt. Your contention in your letter is new to me and I shall have to write you later what I think about it.

Very truly yours,

/s/ DUNCAN CURRY
Referee in Bankruptcy

February 26, 1946

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Re. Mary V. Chaney

Dear Mr. Curry:

I am wondering whether it is now possible to have some disposition of the petition filed by Mrs. Chaney asking for

an order permitting redemption at the appraised value and for a termination of the proceeding in accordance with the Act.

You wrote me on September 28, 1945 that you were considering some phases of this matter, but I have not heard from you since.

If the matter can be set for a hearing in the near future I would appreciate it if you could give me at least two weeks notice, and if at all possible, set the matter for a Friday or a Monday, preferably the latter.

Very truly yours,

JOSEPH I. NACHMAN

March 2, 1946

Mr. Joseph I. Nachman,
2906 Allison Street,
Mt. Rainier, Md.

Dear Mr. Nachman:

I received your letter, dated February 26, 1946 in re Mary V. Chaney, Bankrupt. It seems to me that I have inquired of you several times the amount and date of the last payment that Mrs. Chaney made. It is also my impression that I have never received from you a definite answer about the payments that are delinquent. Please let me know if it is your contention that Mrs. Chaney can redeem the property at the appraised value before paying the delinquent payments. I can have a hearing in this case, and I would like to have it, at any time that will be convenient to you.

Very truly yours,

/s/ DUNCAN CURRY
Referee in Bankruptcy

App. B-10

March 15, 1946

Honorable Duncan Curry
Referee in Bankruptcy
Staunton, Virginia

Re: Mary V. Chaney

Dear Mr. Curry:

I have your letter of March 2, 1946.

It is my position that Mrs. Chaney is entitled to redeem property at its appraised value, and no further or other payments may be required of her.

I do not have before me my records showing the payments last made by Mrs. Chaney. My recollection, however, is that your statement that the last payment was made on April 1, 1944 is correct.

I shall be ready for the hearing in the matter most any time on as much as ten days notice. I may say, however, that the plans in my office call for my being out of Washington for an extended period to begin somewhere about April 10. These plans are not definite, and it may well be that I shall not be out of Washington. However, if it is possible for you to schedule a hearing before April 10, I think the matter can be disposed of. As I stated in my previous letter, it would suit my convenience best if you could set the hearing for either a Friday or a Monday.

Very truly yours,

JOSEPH I. NACHMAN

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1065

MARY V. CHANEY, PETITIONER

vs.

HOLLY STOVER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR HOLLY STOVER, RESPONDENT, OPPOSING GRANTING A WRIT OF CERTIORARI.

DIELUKE CO., PRINTERS, STAUNTON, VA.

INDEX

PAGE

CITATIONS

STATUTES

BRIEF FOR HOLLY STOVER, RESPONDENT, OPPOSING GRANTING A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS:

MARY V. CHANEY, PETITIONER

vs.

HOLLY STOVER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT

BRIEF FOR HOLLY STOVER, RESPONDENT, OPPOSING GRANTING A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS:

INTRODUCTORY STATEMENT

The petitioner has printed as Appendix B to the Petition certain private correspondence of her attorney, which is not a part of the record. In footnote 3 of page 5, and footnote 8 of page 9, of the Petition, the petitioner calls attention to these letters as if they were a part of the record and as if this extraneous matter thus introduced might be considered.

At p. 6 of the Petition,, under the heading "Reasons for granting the Writ," the petitioner says that "while petitioner appealed from the order, no error was assigned to that holding and respondent did not cross-appeal," and accordingly the Circuit Court was without jurisdiction to reverse or modify the portions of the order favorable to the petitioner.

Reference to the brief filed by Holly Stover, appellee, in the Circuit Court of Appeals, pp. 12-18, shows that in fact the appellee assigned cross-error to the judgment appealed from.

STATEMENT OF THE CASE

The opinion of the Circuit Court of Appeals handed down December 28, 1946, not yet officially reported, at the time the judgment was entered, to review which a writ of certiorari is now prayed, briefly but sufficiently states the case. From that statement, the following facts among others appear:

The real estate here involved was appraised in July, 1942, at $5,500.00. Within six months thereafter the bankrupt secured a reappraisal, as a result of which the land was appraised at $10,720.00. The bankrupt is in possession and has paid no rent since January 20, 1944.

The judgment, to which a writ of certiorari is prayed, is in the petitioner's favor. It reverses the judgment of the District Court from which she had appealed. It frees the bankrupt from paying all rent accrued after January 20, 1944, over a period of nearly three years. It assured the bankrupt the opportunity to redeem the property "at its value at the time of redemption."

It overruled by implication only, the cross-error assigned by the appellee.

ARGUMENT

The petitioner's situation is anomalous in that the bankrupt is assailing a judgment in her favor and complaining, apparently, because her opportunity to redeem must be at the *present value* of the land.

It is respectfully submitted that the two "Reasons for Granting the Writ" (Petition, pp. 6-7) assigned by the petitioner are without merit.

The first "reason" assigned by petitioner is that the Circuit Court of Appeals was without jurisdiction to modify the judgment appealed from and to direct a determination of the value of the land involved.

In its opinion (Op., p. 7) the Circuit Court of Appeals says:

"as said in the opinion in the *Wright* case, *supra* (311 U. S. at 278) 'safeguards were provided to protect the rights of creditors throughout the proceedings, to the extent of the value of the property,' and this protection would not be afforded 'throughout the proceedings,' if at any stage it were possible for the debtor to redeem the property at less than its value at that time. Here it appears to the court that during a delay in proceedings there has been such a shift in property values that a prior appraisal of the property" (in this case, August 21, 1944) "cannot be relied upon for a determination of its present value, a new appraisal should be ordered. We think that power to order such reappraisal is implicit in the statute, and that, irrespective of the statutory provision with regard thereto, it inheres in the general equity powers which a court of bankruptcy exercises in the administration of the statute."

The statute (Section 75 (s) (3) provides:

". . . provided, that upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a day for hearing, and after such hearing, *fix*

the value of the property in accordance with the evidence submitted. . . " (italics supplied).

The Circuit Court of Appeals cited and quoted from the case of *Worley* v. *Wahlquist*, 8 Cir. 150 F. 2d, 1007, 1010, as follows.

"The statute purports to give an absolute right, on the timely request of either a creditor or the bankrupt himself, to have one reappraisal made in the proceeding or the value fixed on a hearing, before the court is required to enter any redemption order. The language used is that 'upon request of any secured or unsecured creditor, or upon request of the debtor, the court *shall* cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court' (emphasis added), if he desires to make a redemption. 11 USCA sec. 203, sub. s (3); and compare *In re Wright*, 7 Cir. 126 F. 2d 92, *certiorari* denied 317 U.S. 627, 63 S. Ct. 39, 87 L. Ed. 507. Whether any additional reappraisal or hearing to fix value should thereafter be had would seem to be wholly a matter for the court's sound discretion on the circumstances of the particular situation."

In *Haun* v. *Second Alliance Trust Co., Limited,* 9 Cir. 155 F. 2d, 618, the question involved was the power of the District Court to grant a reappraisal at the request of a secured creditor after the expiration of the three-year stay and after the debtor has paid into court the amount of the original appraisal. The Circuit Court of Appeals held that the court has authority to order such reappraisal. In the opinion (F. 2d, 619) it is said:

"It will be noted that the proviso relating to reappraisals does not in terms require that the request be made within the period of the stay. In the case of the debtor, however, he must necessarily ask a reappraisal within the period if he desires to redeem and is dissatisfied with the existing valuation placed upon the property. This compulsion grows out of the circumstance that his right to redeem is lost if not exercised within the time provided, unless at the termination of the period, reappraisal proceedings are pending. (*Fed. Farm Mortgage Corp.* v. *Paulsen*, 9 Cir. 149 F. 2d 897). But the creditor is not under similar compulsion. His role is passive. *Like the debtor, his right to a reappraisal is absolute* (italics supplied). But, unlike the debtor, he is not placed by the statute under the necessity of demanding the right within a fixed period of time. If he acts promptly after the debtor indicates his purpose to redeem, we think the Court is not only empowered, but is probably required, to cause a reappraisal to be made at the creditor's request. This would seem to be a rational interpretation of the statute, and is in line with the interpretation given it by the courts which have considered the problem."

In *Silver* v. *Rosenburg*, 2 Cir. 139 Fed. 2d, 1020, a question was whether the Circuit Court of Appeals has jurisdiction to modify an award of allowances by a referee in bankruptcy which has been affirmed by District Court, though ordinarily it will not interfere with such award. The Circuit Court of Appeals modified the District Court's judgment, saying:

"We have frequently refused to interfere with the award of allowances by a referee after affirmance by the District Court and in nearly all cases we can properly do

nothing else. Nevertheless, our jurisdiction does exist, and its existence presupposes that there may be occasions for its exercise. It seems to us, in spite of the triviality of the sums involved, that this is one of those occasions, and that it is not a sufficient answer that very little will be left in any event."

It will be seen that the action of the Circuit Court of Appeals here objected to in effect merely assures to the creditor an absolute right he enjoys under Section 75 (s) (3) of the Bankruptcy Act—the right, if and when the bankrupt, instead of merely declaring his desire to redeem, pays the redemption money into court, then to ask and to have a reappraisal, after which, if the reappraised value is greater than that at which the bankrupt has paid money into court, the excess is to be paid into court by the bankrupt.

The right of the creditor to ask a reappraisal after the bankrupt pays his money into court is referred to as absolute, for the right to a reappraisal is expressly given by the statute (Section 75 (s), (3) to the debtor *or* to any secured or unsecured creditor, and it is not possible, in justice to both debtor and creditor, that either party by speedy and premature action—in this case the debtor's and within six months after the primary appraisal—may by obtaining a reappraisal, wipe out the right of the creditor, upon the bankrupt's actually paying money into court, to have a reappraisal.

The action of the Circuit Court of Appeals was well within its power:

In *Denaro v. McLaren Products Co.*, 1 Cir. 9 F. 2d. 328, 330, it was said:

"We have authority under Section 129 of the Judicial Code (28 U.S.C.A., Sect. 227) to determine the case upon

its merits and save both time and expense which evidently both parties desired us to do, as they have argued the merits at length."

In *Highland Ave. and B. Ry. Co.* v. *Columbian Equipment Co.*, 168 U.S., 627, 630, it was said:

"On the hearing in the Circuit Court of Appeals, that court may consider and decide the case on its merits."

In the case of *In re Tampa Suburban Ry. Co.*, 168 U.S. 583, 588, it was said by Chief Justice Fuller:

"The case may indeed, on occasion, be considered and decided on its merits."

The second "question" presented is whether, under the facts of this case, the Circuit Court properly directed that the property be reappraised, or its value determined at a hearing. It is submitted that this question was exclusively a matter within the discretion of the Circuit Court of Appeals upon its consideration of the record, and in the absence of any intimation that the Circuit Court of Appeals has abused its discretion, this Court will not consider or interfere with its exercise of that discretion.

It is respectfully submitted on behalf of the secured creditor, Holly Stover, that this case is not one calling for the exercise by this Court of its supervisory powers, and that the writ of certiorari should not be granted.

J. M. PERRY
L. W. H. PEYTON,
Counsel for Respondent